OVERSEA-CHINESE BANKING CORPORATION LTD

v.

LEE TAN HWA & ANOR. & ANOTHER CASE

HIGH COURT MALAYA, MUAR
EUSOFF CHIN J
[ORIGINATING SUMMONS NO. 239 OF 1983]
4 AUGUST 1988

LAND LAW: *Defendants were owners of a piece of land - Charged land to plaintiff for overdraft facilities - Defendants defaulted in payments - Plaintiff asked Court for order of sale - Purchaser (interveners) for value applied to intervene - Plaintiffs deny knowledge of defendant's rights - Common solicitors - Whether knowledge can be imputed to plaintiffs - No consent from interveners to charge the land.*

The defendants in this case were landowners. The defendants charged the said land to the plaintiffs, a bank, in order to secure an overdraft facility. The defendants defaulted in the payments. The plaintiff proceeded to apply to Court for order for sale under s. 256 and s. 257 of the NLC. The purchasers for value of a portion of the said land applied and were granted leave to intervene and as a result were found as parties to this application for sale.

It became evident that common solicitors handled all transactions between the plaintiff, the defendants and the interveners. The plaintiff's contention before the Court was that they had accepted the land as security without knowledge of the sale transaction conducted by the defendants and the now interveners.

The interveners reply was that knowledge could be imputed to the plaintiff through the common solicitors. At no time did they consent to the said charge being placed against the land.

The interveners further claimed priority over the land as they purchased their portion of the said land prior to the charge being effected in favour of the plaintiffs.

Held:

[1] Where parties employed the same solicitors, the knowledge of the common solicitors could be imputed to the parties.

[2] Thus the plaintiff must be treated as having notice of the sale of the land to the purchasers (interveners) consequently, the charge against the land would not be a valid charge. Therefore the application to have the land sold by auction was refused.

[Application dismissed.]

Cases refereed to:
Dixon v. Winch [1900] Chancery Division, 736
Haroon bin Guriaman v. Nik Mah bt. Nik Mat & Anor. [1951] MLJ 209

Legislation referred to:
National Land Code 1965, ss. 254, 256, 257

For the plaintiff - J.A. Nathan; M/s. J.A. Nathan & Co.
For the interveners - E. Ramasamy; M/s. E. Ramasamy & Co.

JUDGMENT

Eusoff Chin J:

Lee Tan Hwa and Goh Jun Hoon who owned land lot 666, Grant No. 3306 Township of Bandar Maharani, having an area of 4715 square feet charged the land to Overseas Chinese Banking Corporation (plaintiff) on 4 February 1979 as security for overdraft of RM216,000 (out of an authorised limit of RM246,000 for principal). The plaintiff granted the RM216,000 to the defendants.

On 26 October 1982, the amount owing by the 1st and 2nd defendants to the plaintiff was RM259,899.42. The plaintiff issued notice of demand by AR registered post on the 1st and 2nd defendants on 13 November 1982 for payment of the said sum within 21 days. The amount not being settled by the 1st and 2nd defendants, the plaintiff sent to both the 1st and 2nd defendants a statutory notice of default under s. 254 National Land Code. This was done by AR registered post on 2 March 1983, and the service of the notice was effected on the defendants on 4 March 1983. The amount due was not paid by the defendants, and the plaintiff applied to Court for the sale of the land under ss. 256 and 257 of the National Land Code.

There are 3 adjoining units of three-storey shop houses on this land.

Goh Ah Chwee and Chua Choon Yam were granted leave by the Court to intervene, and were joined as parties to this application for sale. Goh Ah Chwee in his affidavits dated 7 May 1985, and 19 November 1985, stated that he had bought 1/3 of the said land from the 2nd defendant on 3 September 1977 for RM183,000. He produced the sale and purchase agreement and the receipts for the payment of RM183,000.

Chua Choon Yam had bought 1/3 of the said land from Lee Tan Hwa (1st defendant) on 2 April 1978. He had paid RM96,000 to the 1st defendant, and had a balance of RM77,000 which he is prepared to pay.

Both the interveners had engaged the same firm of solicitors to effect the sale and purchase transactions. The interveners claimed priority over the land since they had bought the land before the land was charged to the plaintiff by the defendants on 4 February 1979.

Both the interveners did not at any time give their consent to their lands being charged to the plaintiff.

In both the sale and purchase transactions, and the charge transactions, the same firm of solicitors had acted for the original land owners (1st and 2nd defendants), the purchasers (interveners), the chargors (1st and 2nd defendants) and the chargee (the plaintiff).

For the plaintiff, the crux of its contention is that the plaintiff was not aware of any sale or purchase agreements having been previously executed by the chargors (1st and 2nd defendant) to the interveners. The plaintiff contended that plaintiff had therefore taken the charge without notice notwithstanding that their solicitors had knowledge of the previous sale transaction.

The interveners' argument is that notwithstanding that there was no caveat, the solicitors who acted in the charge transaction were the same solicitors who had acted in the sale and purchase transactions, and the solicitors were fully aware of the existence of the sale and purchase agreements and ought to have advised the plaintiffs on this. It is the interveners' contention that since the common solicitors knew of the sale and purchase transaction, such knowledge should be imputed to the plaintiff (chargee) when the charge transaction was being carried out.

The rule is that where two parties employ the same solicitor, communications passing between either of them and the solicitor in his joint capacity must be disclosed in favour of the other, and further where the evidence showed that a party had placed himself entirely in the hands of his solicitor and constituted him his general agent in the transaction, the knowledge of the solicitor must be imputed to him - *Dixon v. Winch* [1900] Chancery Division, 736. So in this case the knowledge of the solicitor that the interveners had bought two-thirds of the land before it was charged to the plaintiff, ought to be imputed to the plaintiff, and the plaintiff must be treated as having had notice of the sales to the interveners, before the land was charged to the plaintiff.

Counsel for the chargee did not dispute the allegation that since the same solicitors were involved in all the transactions, knowledge of the sale and purchase of the land by the interveners ought to be imputed to the plaintiff, but he denied there was any fraud on the part of the plaintiff, and insisted that a caveat ought to have been registered in the land office register by the purchasers.

In the case of the intervener Chua Choon Yam, he had not only paid the full purchase price, but had obtained on 8 June 1981, an order from the Court that he be allowed to have possession of 1/3 of the land which he had bought which was 1,500 square feet, together with one three-storey building on it (as per Exhibit 'CCY1' annexed to his affidavit, affirmed on 7 May 1985). Chua Choon Yam was also allowed by the Court, damages for late possession to be assessed against the land owner.

It is true that a purchaser of land under an agreement has to protect his interest by filing a caveat against the land - *Haroon bin Guriaman v. Nik Mah bt. Nik Mat & Anor.* [1951], MLJ 209. But how many laymen have knowledge of 'caveat' and its application or purpose. That is the reason why the intervenors had employed solicitors to do, and act for them in the purchase transactions. They have to rely on their solicitors who were acting professionally for them, to advise them and to file the caveats for them to protect their interests in the land.

It may be a different story altogether if each party had employed different solicitors to act for him. In such a case, the plaintiff can say that he has no knowledge that two-thirds of the land had been sold by the chargors before the charge was effected.

In the instant case, as admitted by the plaintiff's solicitors, the plaintiff ought to know of the sales which took place before the charge was created. The plaintiff or the common solicitors ought to have asked the purchasers of the land whether they agreed to have the land charged to the bank (plaintiff). The interveners in their affidavits said that they had never given their consent to their solicitors to have the lands charged to the bank.

In this case, if the plaintiff had not been told by the parties' common solicitors that the interveners had purchased 2/3 of the land before the whole land was charged to the plaintiff it certainly is not the fault of the purchasers.

I find there is no evidence that fraud had been practised on the chargee.

Under the circumstances, I hold that the plaintiff knew through their solicitors that the interveners were purchasers of a portion of the land. The charge of the whole land to the plaintiff could not be a valid charge since a substantial portion of it was not absolutely owned by the 2 defendants. There is nothing to prevent the plaintiff from proceeding against the defendants or any party who was negligent in handling the charge transactions.

Now that the first intervener had completed the purchase and had gone into possession, it would not be justified and would be plainly unconscionable to deprive him of the shophouse he had bought by holding that the charge was valid when in fact it was void, and consequently I refused to grant the plaintiff's application to have the land sold by public auction. I dismiss the plaintiff's application with costs to the intervenors.

Also found at [1989] 1 CLJ 458